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Ora et Labora[1] Thoughts on the Search for a Solution in Concordia

Background. The theme

Virtually not one single day passes by without a notice or two on some incident involving religious manifestations in schools or at places or work. Manifestations most often prompting intervention are displays of crosses (or crucifixes) and Muslim pieces of clothes, e.g. the Muslim scarf or more enveloping attire such as a burka.

A few examples to illustrate! *France* vibrates over the expulsion in early October 2003 of sisters Alma and Lila Lévy, 18 and 16 years, from a public school because they insist on wearing a Muslim veil at school. *Germany* on September 24, 2003, learned of the ruling that day by its Constitutional Court declaring that the German constitution alone does not ban a Muslim teacher (Ms Ferestha Ludin) from veering a Muslin scarf in class at state schools. In 1995, on the other hand, that country had heard the same court declare unconstitutional the display of crosses and crucifixes in state schools rooms. *Italy* presently experiences furious protests against an October 18, 2003, decision by a court ordering a state school in Ofena to remove a crucifix from a schoolroom. *Sweden* on October 24, 2003, partook of a decision by its State School Agency allowing schools to ban the Muslim burka, a decision triggered by the

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[1] Qui orat et laborat, cor levat ad Dominum cum manibus ("Anyone who prays while working lifts the heart to God with his hands"). The sentence is part of a medieval hymn. The recommendation "Ora et labora" (Pray and work) is often quoted as the motto of the Benedictine Order.

> appearance at the beginning of the school year in September of two girls wearing the burka. *Switzerland* on February 15, 2001, learned that the European Court of Human Rights had upheld a decision by the Swiss Constitutional Court *(Tribunal fédéral)* to forbid a Muslim teacher from wearing a Muslin scarf in a state school.[2]

Religious diversity is fast becoming a reality of overriding importance in all western European countries, from southwest (Portugal) and northeast (Finland). A radically new situation emerges. To some extent it has already happened but as of today we are only beginning to realize the full impact of this new situation.

We, the peoples of these parts of Europe, are ourselves at the origin of the new situation. The break-up of empires – the worldwide British and the French in North Africa – have brought people from them, reshaping the ethnic, cultural and religious composition of the mother countries in the process. Even greater inversions will be brought about by the rapidly changing demographic composition of the population caused by a seemingly unstoppable decrease in nativity rates. In all western European countries the birth rate has fallen far below the critical replacement level of 2,1 child per woman. No external forces have pressed the rate downwards: food is abundant, land is available, the labour market needs new hands, epidemics and other medical mass killers are under control *et cetera*. Internal factors account for the decline: gender equality, female control over their own bodies, contraceptives, female work force participation, a socio-economic structure in society increasingly calling for the two incomes family *et cetera*. To put it in proverbial terms: *you've made your bed, now you lie on it.*

Most of us hail these internal developments as important victories for mankind. However, it has put us in a difficult situation: there are too few of us and we are greying. Immigration on a massive scale is rapidly becoming a factor to count with. However, prospective immigrants most easily available are often enough Muslim. In France Islam is by now the second largest religion. Millions of Muslims live in the midst of Europe.

What have the legal responses been so far to this religious diversification? What should the answers be in the foreseeable future? These are the questions to be highlighted here. Only a few have been singled out. No attempt to provide a comprehensive treatment is made. Extreme brevity is *de rigeur*.

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[2] **France**: see any number of web sites discussing the school case, e.g. by searching under the names of the girls or the name of the school (lycée Henri-Wallon d'Aubervilliers). **Germany**: *Ludin case* and *Bavarian schoolroom cross case*. **Italy**: any number of web sites, e.g. by searching under "schools, crucifixes, Ofena". **Sweden**: homepage (in English) of the State School Agency (www.skolverket.se/english/index.shtml) "Schools given the go-ahead to ban burqas". **Switzerland**: *Dahlab case*.

The legal framework

The 1950 European Convention on Human Rights and Fundamental Freedoms (*the Convention*) of the Council of Europe is the supreme human rights code in Europe.[3] Article 9 of the Convention provides – *inter alia* – for freedom of religion. That article constitutes the legal framework for freedom of religion in all member states, regardless of whether domestic legislation to the same effect exits as well.

Case law under Article 9 of the Convention distinguishes between the *forum internum* and the *forum externum*. The *forum internum* is "religion" itself and the *forum externum* is manifestations of "religion". The first limb is absolute, inviolable. There is no room for limitation or derogation. The second is derogable to some extent, subject to state regulation. How does case law distinguish between these two forums? Several issues are involved. First, what qualifies as "religion" and what is so loose and/or vague or haphazard that it cannot be said to be a "religion" (or "belief"), i.e. the horizontal length (or breadth), as it were? Case law has given the concept a broad definition. Second, what does the notion of an undisputed "religion" (or "belief") encompass, i.e. the vertical depth, as it were? Does "religion" entail only its core ideas and beliefs or does it encompass the ensuing way of life as well, at least to some extent? Case law is clear: the concept of "religion" is defined narrowly in this respect. "Religion" – the *forum internum* – has much horizontal breadth but little vertical depth. Third, to what extent can subjective feelings and opinions be taken into consideration? Under case law the borderline between the *forum internum* and the *forum externum* is defined objectively.

This article is limited to the *forum externum*. Case law is markedly situational, i.e. the circumstances at hand are of very great importance, often decisive. For example, the outcome will be strongly influenced if secularism is a fundamental dogma in society (as reflected e.g. in *Karaduman*).[4] Thus, at least to some extent, the Convention allows countries to fashion their response to religious manifestations according to their basic notions of society. One cannot say for sure that the outcome in a case like *Karaduman* would have been different if the chain of events had unfolded in a country not based on secularism, e.g. Sweden. Case law offers no example for comparison. However, chances are that it would. In a country (e.g. Sweden) where people can wear religious garments on official documents like passports and driving licences, it

[3] For an analytical discussion of relevant case law under the Convention see e.g. FAHLBECK, REINHOLD: Ora et Labora – On Freedom of Religion at the Work Place: A Stakeholder cum Balancing Factors Model, *International Journal of Comparative Labour Law and Industrial Relations*, 2004:1.

[4] In *Karaduman* the Commission upheld a decision to prohibit a Turkish student from appearing on an official university document wearing the Muslim scarf because, *inter alia*, it was against *the* fundamental principle of Turkey, i.e. the principle of secularism.

might very well be considered a violation of freedom of religion if a state university required photos without them. This means that rather diverging positions in the member states can be accepted under the Convention.

Freedom of religion under the Convention covers both the freedom to have and to express religious opinions (the *positive* side) and the freedom not to have any religious beliefs and to be free from unwanted religious influence (the *negative* side). Negative freedom of religion is no less important under the Convention. It is protected to exactly the same extent as the positive.[5] Case law might seem to indicate that when there is a conflict between the two, the negative side prevails. However, that is misleading. The negative side is not a supra-norm, hierarchically superior to the positive side.[6] They are equal in scope.

Religious multiplicity: less or more scope for religious manifestations?

Has religious multiplicity lead to a stricter, less permissive, attitude towards religious manifestations in public schools and at places of work or to less strictness, more permissiveness? What route should be chosen in this respect for the foreseeable future?

There cannot be any doubt but that increasing religious diversity has lead to a more permissive attitude towards open religious manifestations by people. The Muslim scarf has become a common sight in all western European countries and so have more elaborate Muslin accoutrements. The Sikh turban is a familiar sight in public. Public institutions in most countries have followed suit to some extent.

[5] The leading case is *Kokkinakis*. Said the Court (para 31, in words reiterated time and again): "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been won over the centuries, depends on it". In the *Buscarini case*, the Court elaborated (para 34). "That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion".

[6] The Bavarian Administrative Court (*Bayerische Verwaltungsgericht*), as quoted by the German Federal Constitutional Court (*Bundesverfassungsgericht*) correctly stated this in the *Bavarian schoolroom cross case* (p 4): "Das Spannungsverhältnis zwischen positiver und negativer Religionsfreiheit müsse unter Berücksichtigung des Toleranzgebotes nach dem Prinzip der Konkordanz gelöst werden. Danach könnten die Beschwerdeführer nicht verlangen, daß ihrer negativen Bekenntnisfreiheit der absolute Vorrang gegenüber der positiven Bekenntnisfreiheit ... eingeräumt werde ..."

What course should be taken? The European Court presents the issue.

"The Court recalls that freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. The pluralism indissociable from democratic society, which has been dearly won over the centuries, depends on it. It is true that in a democratic society it may be necessary to place restrictions on freedom of religion to reconcile the interests of the various religious groups (see the Kokkinakis judgement ...). However, any such restriction must correspond to a 'pressing social need' and must be 'proportionate to the legitimate aim pursued' (see, among others, the Wingrove v. the United Kingdom judgement ...)".

"Although the Court recognizes that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other (see, *mutatis mutandis*, the Plattform "Ärzte für das Leben v. Austria ...)".[7]

The issue has reached the highest courts in Germany and in Switzerland. A Muslim teacher in Germany wanted to wear the Muslim scarf at school, even in class. School authorities and the administrative courts prohibited it, including the Federal Administrative Court (*Bundesverwaltungsgericht*). The court expressly pointed at religious pluralism as a reason for taking a stricter, less permissive, position to religious manifestations in state schools (as an outflow of state neutrality in religious matters).[8] The Federal Constitutional Court (*Bundesverfassungegericht*) overturned the ruling. It stated that "(D)er mit zunehmender religiöser Pluralität verbundene gesellschaftliche Wandel kann Anlass zu einer Neubestimmung des zulässigen Ausmaßes religiöser Bezüge in der Schule sein".[9] What direction should such new regulation take? The Court abstained from taking a position. It opened the way for diverging solutions in the various countries (*Länder*) of the Federal Republic. Said the Court (para 65):

"Es ließen sich deshalb Gründe dafür anführen, die zunehmende religiöse Vielfalt in der Schule aufzunehmen und als Mittel für die Einübung von

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[7] Serif v. Greece, ECHR Reports 1999-IX (December 14, 1999), paras 49 and 53. The same wording is found in Agga v. Greece, Applications nos. 50776/99 and 52912/99 (October 17, 2002).

[8] Said the Court (BverwG 2 C 21.01, July 4, 2002): "Deshalb gewinnt das Neutralitätsgebot mit wachsender kultureller und religiöser Vielfalt – bei einem wachsenden Anteil bekenntnisloser Schüler – zunehmend an Bedeutung und ist nicht etwa im Hinblick darauf auszulockern, dass die kulturelle, ethnische und religiöse Vielfalt in Deutschland inzwischen auch das Leben in der Schule prägt, wie die Klägerin meint".

[9] *Ludin case*, para 64.

gegenseitiger Toleranz zu nutzen, um so einen Beitrag in dem Bemühen um Integration zu leisten. Andererseits ist die beschriebene Entwicklung auch mit einem größeren Potenzial möglicher Konflikte in der Schule verbunden. Es mag deshalb auch gute Gründe dafür geben, der staatlichen Neutralitätspflicht im schulischen Bereich eine striktere und mehr als bisher distanzierende Bedeutung beizumessen ...".

In the *Dahlab case*, the Swiss Government seems to have argued that pluralism calls for a stricter, less permissive attitude.[10]

What factors will decide regulation in member states and to what extent are they free to regulate as they wish? A few words will be said to answer these questions below (Parting words).

Religion or culture? Degeneration

Religious symbols are ubiquitous in most countries, differing in character according to the prevailing faith, for sure, but nevertheless everywhere to be found. The Christian cross (or crucifix) is one example, the Muslin scarf another. If considered to be religious they are protected by the European Convention but also restricted by it because of the negative freedom of others. If, on the other hand, they are cultural they do not enjoy protection by the Convention but, conversely, they are not restricted by it either and few countries, if any, restrict manifestations per se.[11] This means that the scope for cultural manifestations is larger than for religious ones.

Such considerations have been brought forward on several occasions to justify manifestations that some consider religious. For example, in the German case concerning the wearing of a Muslim scarf by a teacher in a public school, the majority of the members of the Constitutional Court found that "(D)as Kopftuch ist – anders als das christliche Kreutz (...) – nicht aus sich heraus ein religiöses Symbol". A minority was of another opinion, stating that "Zu sehr ist das Kreutz – über seine religiöse Bedeutung hinaus – ein allgemeines Kulturzeichen".[12] Partly for that reason the majority accepted and the minority rejected the claim by the teacher that the scarf did not violate the constitutional state neutrality requirement in religious matters. Conversely, in the Swiss case concerning the Muslim scarf worn at a public school, the Federal Court had found that "it is scarcely conceivable to prohibit crucifixes ... and yet to allow

[10] *Dahlab*, p 459.

[11] Exceptions exist, e.g. when manifestations violate some protected interest. Examples here are behaviour that is racist or discriminatory against certain people, e.g. because of sexual orientation.

[12] *Ludin case*, paras 50 and 113.

teachers themselves to wear powerful religious symbols of whatever denomination".[13]

Similar arguments had been advanced with even more pregnancy in Germany in the *Bavarian schoolroom cross case* concerning crucifixes in state schoolrooms. The majority stated unequivocally that "(D)as Kreutz ist Symbol einer bestimmten religiösen Überzeugung und nicht etwa nur Ausdruck der vom Christentum mitgeprägten abendländischen Kultur". It went on to say that "(D)as Kreutz gehört nach wie vor zu den spezifischen Glaubenssymbolen des Christentums. Es ist geradezu sein Glaubenssymbol schlechthin". It concluded by saying that "(E)s wäre eine dem Selbstverständnis des Christentums und der christlichen Kirchen zuwiderlaufende Profanisierung des Kreuzes, wenn man es ... als bloßen Ausdruck abendländischer Tradition oder als kultisches Zeichen ohne spezifischen Glaubensbezug ansehen wollte".[14]

Another way of looking at the culture versus religion distinction is to consider the impact of manifestations and symbols on people at large. Frequent exposure to a *prima facie* religious manifestation reduces the religious impact of the exposure. Commonality and ubiquity will inevitably reduce the impact. The Christian cross offers an illustrative example. The cross has a central role in the Christian religion. The cross is *per se* a very powerful religious manifestation indeed and very distinctive. The intrinsic meaning of a piece of cloth like a Muslim scarf or a Sikh turban is insignificant compared to the extremely potent intrinsic meaning of the cross (and even more the crucifix). However, display of crosses is very common in public buildings in many countries, e.g. Italy and Poland. We are all so used to such display that the idea of invoking the negative freedom of religion in order not to have to be exposed to it might sometimes seem far-fetched.

Of great importance is also the use of symbols in non-religious contexts. As is well known, people oblivious of any religious meaning of a cross wear crosses all over the world as small decorations.

Both commonality and non-religious use mark steps on a road towards degeneration where manifestations lose their manifestation potential. One argument advanced by the minority in the *Bavarian schoolroom cross case* was that crosses are found everywhere in Bayern. A consequence, it was argued, was that "(U)nter solchen Verhältnissen bleibt auch das Kreutz im Klassenzimmer in Rahmen des Üblichen".[15]

A "degeneration argument" was advanced in the *Buscarini case*. The case involved newly elected members of the legislative body in San Marino. They had to take an oath "on the Holy Gospels". They refused under Article 9 of the Convention. The Government argued that the oath "had lost its original

[13] *Dahlab case*, p 457.

[14] *Bavarian schoolroom cross case*, p 19 et seq. See also p 24.

[15] Ibidem, p 33.

religious character, as had certain religious feast-days which the state recognised as public holidays" and was now just "historical and social in significance and based on tradition" (para 32). The European Court did not agree.

Is degeneration desirable? If harmonious coexistence, conflict avoidance, religious harmony and tolerance are values to be pursued, then walking the road of degeneration might be considered a sign of health and progress. To the religious person it may not seem so. However, the significance to the religious person of the symbol is not necessarily affected. The external degradation of his or her religious symbol becomes a price for its general acceptance. On the other hand, degeneration might reinforce gender inequality. The more accepted the Muslim scarf becomes the more difficult it might become for Muslim women not to wear it. Oppression might become mainstream, as it were!

Religion or Gender Inequality? Female oppression

Freedom of religion versus protection against gender discrimination is fast becoming an issue of overriding importance. The issue is divisive, to put it mildly.

Dahlab is the only case before the European Court so far that deals with it. The question in this respect was: is the Muslim scarf an expression of freedom of religion or of discrimination of women? Is the scarf an expression of (male) oppression of women?

Said the Court: "... it cannot be denied outright that the wearing of a headscarf ... appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils". With reference to Article 14 (discrimination) the Court remarked "that the advancement of equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention".[16]

Can gender equality legislation be used to impose a ban on the Muslim scarf? Religious accoutrements are not limited to women. For example, the Sikh turban is worn mostly by men as is the Jewish kippa. It seems hard to believe that anyone would seriously consider banning them for reasons of gender equality. Why? The answer seems straightforward. They are worn

[16] Pp 463 and 464.

voluntarily, one feels. However, that is not a good answer since all these religious garments are involuntary in the sense that an external force, i.e. a religion, imposes them. So why consider banning the scarf but not the turban or the kippa? The answer seems to be that it is felt that the scarf is imposed by the men rather than by religion. This argument has much to speak for it. Muslim scholars are divided over the interpretation of the Koran and many Muslim communities and countries do not consider wearing a scarf a religious commandment.

Nowhere in Europe is the situation tenser than in France. The reason, perhaps, is that France since 1905 has embraced an exceptionally strict separation between state and religion (*laicité*).[17] A heated debate takes place at the time of this writing. Where politicians and various pressure groups have until recently rejected the idea to legislate against the Muslim scarf (and perhaps other religious garments as well) in public schools and institutions, the mood seems to be changing. A few voices to illustrate!

Ms Hanifa Cherifi is a member of the Haut Conseil de l'Intégration and a well-known public figure. Herself of Muslim origin she speaks out strongly against the scarf. Stating that "(L)e voile est un piège, qui isolise et marginalise" she says: "Cette idéologie est fondée sur l'apartheid sexuel. Tous ceux qui réclament le port du voile le font au nom d'un islam rigoriste, non pas pour promouvoir les femmes".[18] However, when asked if she favours a complete ban on the scarf at public schools, she is strongly negative. The result would be to exclude the girls from school altogether. "Pour moi les élèves voilées sont des victimes. Leur éxclusion de l'école n'est pas une solution satisfaisante. Elle pénalise ces personnes appartenant à des milieux défavorisés".[19] The scarf, she says, "est bien plus qu'une tenue vestimentaire. Il renvoie à une restriction de la mixité, de la liberté individuelle, et met à mal l'égalité des sexes. Il faut donc s'interroger sur la signification du voile avant de se demander si c'est un libre choix ..."[20]

Ms Chahdorrt Djavann is an immigrant from Iran. There she wore the scarf but felt liberated when she took it off in France. In a much publicised book she ardently argues in favour of banning the scarf in public schools and offices and at places of work.[21] In her opinion "(L)e voile n'est pas moins grave que l'excision".[22]

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[17] For short introductions to this and the ongoing debate in France see articles in The Economist, September 13, 2003, *In the name of God – A survey of Islam and the West*, p 14, and October 25, 2003, *Islam in France – All over an inch of flesh*, p 25.

[18] *Le Monde*, December 15, 2001, interview with Catherine Simon.

[19] *L'Humanité*, April 30, 2003, interview with Mina Kaci.

[20] Ibidem.

[21] DJAVANN, CHAHDORRT: *Bas les voiles!*, Editions NRF Gallimard, 2003.

[22] *L'Humanité*, October 9, 2003, interview with Dany Stive.

Nicolas Sarkozy, French Interior Minister, gave a speech on April 19, 2003, at the annual meeting of the Union des Organisations Islamiques de France. The speech sounds a little like reading the Riot Act to unruly minors! Said he: "La religion musulmane ne doit pas être en France une religion à part. Elle doit trouver la place qui est la sienne comme les autres cultes reconnus depuis longtemps. Ni plus, ni moins. --- La laïcité est un principe fondamental de notre République. --- Il ne peut y avoir en France d'Islam porteur d'un discours contraire aux valeurs Républicaines. Cet Islam est en France illégal et j'en tirerai toutes les conclusions. La loi de 1905 pose le principe que tout discours dans un lieu de culte qui inciterait à résister à l'application des lois ou à soulever une partie des citoyens contre les autres doit être puni. Que nul ne doute qu'il sera. --- Cette loi est juste et elle s'applique à tous quelle que soit leur réligion. Elle s'applique tant aux imans qu'aux prêtres ou aux rabbins sans distinction car il n'y a qu'une seule loi en France, la loi de la République. Et cette loi sera appliquée. --- La loi impose que sur une carte national d'identité, la photographie du titulaire soit tête nue que ce soit celle d'une femme ou d'un homme. Cette obligation est respectée par les religieuses catholiques, comme par toutes les femmes vivant en France. Rien ne justifierat que les femmes de confession musulmanes bénéficient d'une loi diffrerente. --- cette loi ne se négocie plus car elle est au coeur de la République. --- Il n'y a pas de pratique qui puisse mettre en échec la loi de la République".[23]

President Jacques Chirac in a much publicised speech on October 22, 2003, declared that "(L)a laicité constitue pour chaque citoyen une protetction fondamentale, la garantie non seulement que ses propres convictions serons respectées, mais aussi que les convictions des autres ne lui seront jamais imposées".[24]

In the meantime a presidential commission is preparing a report on French secularism (*laicité*). Part of the task is to examine "l'égalité entre les sexes et la dignité de la femme". The commission is authorised to propose legislation.[25]

Gender equality legislation cannot be used to exclusively ban the scarf. If a ban were to be introduced it would have to cover all ostentatious religious garments, one must assume. The European Convention does not seem to be an obstacle to such legislation. Indeed, the German Federal Constitutional Court in the *Ludin case* opens the way for precisely such legislation in the various countries (*Länder*) of the German Federal Republic. At the present writing some countries have made public that such legislation is under consideration.

In the previous section, it was suggested that allowing religious symbols to degenerate is perhaps not a bad idea. A ban on such symbols would inevitably

[23] The speech is available on the Net, e.g. at www.religioscope.info/article_143.shtml.

[24] The speech is available on the Net, e.g. at www.mef.qc.ca/laicite-pas-negociable.htm.

[25] La Commission de Réflexion sur l' Application du Principe de Laïcité, appointed July 3, 2003, by President Jacques Chirac, chaired by Bernard Stasi (*Commission Stasi*). For brief information see articles referred to in note 18 above.

work against degeneration. This might be seen as something per se negative. The result might be to infuse tension rather than defuse it. On the other hand, degeneration might not be in the best interest of Muslim women. A ban on the scarf might help liberate Muslim women in the long run!

Integration: uniformity or multiformity?

An argument often advanced by people wanting to manifest a religious belief in a new environment is that it can promote integration into that environment. On one occasion an expert told the German Federal Constitutional Court that she had conducted a study of some of Muslim women. The women held that "(D)ie Bewahrung ihrer Differenz ist nach dem Verständnis der befragten Frauen Voraussetzung ihrer Integration". Indeed, the scarf was worn "um in einer Diasporasituation die eigene Identität zu bewahren".[26]

To the originators of that environment this argument might sound ludicrous. How can integration be promoted by behaving in a conspicuously different way? Does not the old adage "When in Rome, do as the Romans do" apply? To some extent the answer to such queries concern the meaning of "integration". Does it mean "assimilation" or does it mean something else, e.g. building one's own lifestyle according to the traditions of one's country of origin while simultaneously pursuing a lifestyle in terms of social and professional life that conforms to the population at large?

Etymologically, the word "assimilation" is derived from the Latin word "similis", i.e. making similar. Uniformity is the goal of such assimilation. Immigrants have traditionally tried to immerse themselves into the existing social body in order to adjust as much as possible to the new environment. In recent times a rather different way of behaviour has become common. The Muslim women just quoted represent this new mode of comportment.

Traditionally western European societies have promoted uniformity as a goal in itself, as an expression of a national "character". Uniformity – conformity - has provided both pride and protection. Nonconformity has been frowned upon. Social ostracism has met many a nonconformist. The very idea that one could become an accepted and full-fledged member of a society without adopting its mores has been quite alien, indeed virtually unthinkable. Membership in a community has meant conformity, uniformity: assimilation.

Now a new concept is emerging, multiformity rather than uniformity, or unity through diversity.

Will the freedom of religion article of the European Convention accept this trend? So far the Court has not been squarely called upon to assess the multiformity versus uniformity issue. However, the balance between positive

[26] *Ludin case*, para 52.

and negative freedoms so far points in the direction that multiformity will not be easily accepted. The two freedoms cannot easily coexist if coexistence means actually sharing the same arena. One – or both – might have to their tune down its assertiveness. *Karaduman* exemplifies that. However, subsequent case law, *Dahlab* in particular, has introduced factors such as harmonious coexistence, conflict avoidance, religious harmony, tolerance and proportionality between manifestation and potential impact. These concepts are not all found in the Convention. They are, however, well known in the law of at least some member States, e.g. Germany and Switzerland. For example, the European Court quotes freely and extensively from the decision by the Swiss Federal Court in its ruling on the Dahlab situation.

However, in all cases so far where positive and negative freedom of religion have been confronted, the result has been to prohibit the positive religious manifestation. Is it justified to say that when there is a confrontation the result is that the two sides of religious freedom neutralise each other, one effectively extinguishing the other? Are we concerned with a zero-sum game, as it were? So far the answer seems to be affirmative. If, however, notions like harmonious coexistence, conflict avoidance, religious harmony and tolerance, in particular, are to be given substantive meaning the outcome will be quite different. The Swiss Federal Court showed that when it discussed the impact of the powerfulness of the manifestation. Finding the Muslim headscarf a powerful manifestation, it notes that less powerful manifestations were accepted by school authorities, i.e. "discreet religious symbols at school, such as small pieces of jewellery".[27] The ruling of the German Federal Constitutional Court in both the *Bavarian schoolroom cross case* and the *Ludin case* strongly argued in favour of compromises, tolerance and *praktische Konkordanz*. If achieved, integration can indeed mean multiformity rather than uniformity. It points at the possibility of a plus-sum game, as it were!

Religious Multiplicity or Majority Rule? Majority versus minority

Internally, European countries have traditionally been religiously rather unified. One religion has prevailed. Religious multiplicity was the exception. The exception has now become the rule but majority religions are still very much a characteristic. To what extent does the European Convention allow religious majorities to rule over religious minorities?

Human rights are to a great extent minority rights. Majorities enjoy protection for their particular trait for the simple reason that they constitute a majority. There is a constant danger that religious majorities de facto or de jure suppress minority religions. In *Karaduman* the Commission pointed at this risk.

[27] *Dahlab*, quoting the Swiss decision.

Turkey is predominantly Muslim. Expressing Islam can thus exert particular and undue pressure on non-Muslims. Partly for that reason the Commission took a negative stand to the wearing of a Muslim scarf. Said the Commission: "Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practice that religion or who adhere to another religion" (page 108).

Indeed, minority protection runs as a main thread through case law under the Convention. No case has explicitly discussed majority religious expressions versus minority ones. There can be no doubt, however, that minority protection is a focal ingredient.

The conflict between majority and minority has come to fore clearly in German case law. The *Bavarian schoolroom cross case* is illustrative. Bavaria is a staunchly catholic country. Under Bavarian rules there shall be a cross (or crucifix) in every public schoolroom. The German Federal Constitutional Court (*Bundesverfassungsgericht*) declared the rule unconstitutional. The Bavarian Government defended the rule by pointing at the strength of Catholicism in Bavaria and the fact that a majority of the Bavarian population had voted for a school system with Christian character (*christliche Prägung*). The cross was part of such a character. The Constitutional Court was not impressed. Pointing at the clash between the rights of minority and majority the Court said: "Der daraus entstehende Konflikt läßt sich nicht nach dem Mehrheitsprinzip lösen, denn gerade das Grundrecht der Glaubensfreiheit bezweckt in besonderem Maße den Schutz von Minderheiten".[28] Indeed, "(A)uf die Zahlenmäßige Stärke oder die soziale Relevanz kommt es dabei nicht an ... Der Staat hat vielmehr auf eine am Gleichheitssatz orientierte Behandlung der verschiedenen Religions- und Weltanschauungsgemein-schaften zu achten".[29]

However, this does not mean that there is no room for taking majority wishes into consideration. In the *Ludin case* the German Federal Constitutional Court delegated authority to regulate religious manifestations in public schools to the various countries (*Länder*) of the Federation. These have different religious compositions. Tolerance and compromise must be promoted. However, differences in religious composition "schließt ein, dass die einzelnen Länder zu verschiedenen Regelungen kommen können, weil bei dem zu findenden Mittelweg auch Schultraditionen, die konfessionelle Zusammensetzung der Bevölkerung und ihre mehr oder weniger starke religiöse Verwurzelung berücksichtigt werden dürfen".[30]

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[28] *Bavarian schoolroom cross case*, p 24.
[29] Ibidem p 17.
[30] *Ludin case*, para 47.

There is every reason to believe that the European Court will arrive at an identical (or very similar) result when confronted with the issue. The position of the German Constitutional Court is in perfect accordance with the situational character of case law under the Convention. Religious multiplicity with due – but not overdue – regard for the majority seems to be the position to be expected. A principle of proportionality, of a kind!

Private versus Public Spheres. A World Apart?

State neutrality and separation between state and religion have been crucial in many, indeed most, relevant court cases under Article 9 in the Convention and under member state law. The state neutrality requirement is absent in private institutions, e.g. private workplaces.

What is the position of the Convention to religious manifestations at such workplaces? No case law exists. However, the structure of the Convention provides some guidance. The Convention imposes on the member States an obligation to positively promote the enjoyment of the rights contained in the Convention. This obligation is not restricted to situations where the State itself is a party. Extensive anti-discrimination legislation in member countries in the recent past is one way of fulfilling that obligation, for example rules mandating employers to actively promote religious diversity at the workplace.

Case law under the Convention also provides guidance. The first observation is that private employers are not constrained by considerations concerning religious neutrality. By and large they can give their business any profile they like. If they want their business to have a certain religious character they are free to act accordingly. A consequence of this is that courts have much wider frames to decide cases involving religious manifestations. Second, the arguments and discussions in case law is applicable to a great extent to the private sector as well.

This seems to be as much as can be said with certainty at present. It is not much!

Some case law exists in the member States. The *Muslim salesclerk case*, decided by the German Federal Labour Court (*Bundesarbeitsgericht*) in October 2002, is of particular import. The reasoning of the German court is detailed and analytical. The court quickly passes over the neutrality argument invoked by the employer and introduces a novel approach to the resolution of freedom of religion disputes in private employment. The reasoning is very much in line with European Court reasoning. Highly likely, this ruling will, in turn, influence the Court.

The court came to the conclusion that the termination of a woman, who announced her intention to start wearing a headscarf, was not justified. The constitutionally protected freedom of religion of the woman outweighed the

business interests of the employer, though also protected by the German Constitution. The employer claimed that it feared considerable business problems. Since the employee had not debuted in her scarf when she was terminated, no such problems had yet been encountered. For this reason the German court found that the dismissal was not socially justified (*sozial gerechtfertigt*). Misgivings and sheer conjecture (*bloße Vermutungen und Befürchtungen*) are not enough to set aside constitutional rights, in particular since these could not be substantiated by experience from elsewhere. For that reason there was no need to consider in detail how to balance the opposing, constitutionally protected, positions of the parties.

Obiter dicta, the court engaged in a detailed discussion how to balance competing interests in order to arrive at a constitutionally acceptable accord (*praktische Konkordanz*).[31]

A similar ruling in France in October 2003 has also attracted widespread attention.[32]

An employee had worn the scarf for many years. She was transferred to company headquarters but had no direct contact with customers. No incident involving customers had occurred. However, she was terminated when she refused to wear her scarf less ostentatiously. The company claimed that it had acted out of "neutralité". Just like the German court, the French court dismissed that argument. On the contrary, it found the termination could not be justified by "des elements objectifs, étrangers à toute discrimination".

The private workplace is indeed a world apart from the public, at least in countries where state neutrality is an important factor.

However, workplaces are not arenas for religious manifestations. On the other hand, employees are by and large at liberty to dress as they like. A balance has to be struck between competing interests. What factors are relevant? A few words will be said in the parting section.

Parting words

A trend towards banning conspicuous religious manifestations in schools or at places of work would mean that religious pluralism results in a stricter, less permissive, interpretation of state neutrality in religious matters. In the same vein it would tend to protect religious symbols against degeneration. In the long run it might promote Muslim female liberation from oppressive requirements to wear specific garments. It would promote uniformity over multiformity. It

[31] For a discussion see FAHLBECK: op. cit. footnote 3 above.

[32] The *Dalila Tahri case*, La Cour d'Appel de Paris, October 9, 2003. Ample information is available on the Net, e.g. by using a search motor like Yahoo and searching under the name Dalila Tahri.

would be inimical to the advancement of minority rights. A trend towards allowing such manifestations to a greater extent would have the opposite effects (though possibly with a negative side-effect for Muslim women).

What factors will decide case law under the Convention and regulation in member states concerning religious manifestations in schools and at places of work? To what extent are member states free to regulate as they wish? Several factors stand out.

First, tolerance and compromise. As has been said the Convention covers both freedom to have and to express religious opinions (the *positive* side) and freedom not to have any religious beliefs and to be free from unwanted religious influence (the *negative* side). Regulation that violates either side is in contravention of the Convention. This limits the range of legislative action, working in favour of tolerance and compromise. As has also been shown, the Convention favours pluralism. As of late, in particular in *Dahlab*, the European Court has introduced concepts like tolerance and compromise. The task ahead is to make them operational in order to strike a balance between opposing but per se legitimate rights, e.g. positive versus negative freedom or positive freedom versus parental rights to choose education for their children.

Second, situational solutions. As has been pointed out, case law is situational. Basic values and norms in a given society are allowed to influence Court rulings and statutory regulation. It is a big difference between on the one hand states that make secularism a basis for society and centre society around it and on the other hand states that do not (though they are secular). France and Turkey exemplify the first group, the Nordic countries the latter. Even per se rather inconspicuous and innocent religious manifesta-tions can assume grave proportions in the one kind of society but not in the other. Case law accepts such considerations (e.g. the *Karaduman case*). Comparatively restrictive regulation is likely in strongly secularist countries with permissive regulation at the other end of the spectrum.

Situational solutions are mandated also by concern for the smooth conduct of business. The *Muslim teacher case* illustrates that. A public body (as in the *Muslim teacher case*) or an employer has the right – and indeed the obligation, in some instances – to see to it that business can be conducted in the proper way.

Third, proportionality. As is well known proportionality permeates interpretation of the whole Convention. In *Dahlab* the Court points at the proportionality between manifestation and potential impact.

Fourth, as has been said the Convention imposes on member states an obligation to promote religion. Legislation in the various member states must take that into account. As has also been said, legislation in member states have already done so to a consider-able extent.

Fifth, gender equality is an overriding interest in Europe. The issue of gender equality versus religious manifestations has probably not been squarely

dealt with so far in any European country and certainly not by the European Court. Here, legislators and courts will find themselves in a minefield both legally and morally. Gender equality is not flexible, not a phenomenon that can be realized in proportional degrees. On the whole, it's there or it's not there. Religious manifestations, on the other hand, are flexible in terms of ostentation and conspicuousness. Freedom of religion in terms of symbols and manifestations can be realized in proportional degrees. Perhaps that difference can provide direction. Proportionality is after all one of the building blocs of the Convention.

In all these five respects a balance has to be struck. The balance will have to involve all the various stakeholders and their opposing interests.[33] At the end of the road lies the goal: praktische Konkordanz, entente cordial, a viable concord, a mode of life that allows religious minded people to follow the invitation: *Ora et Labora in Concordia*!

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Principal Cases (with headwords and short summaries)

Convention cases:

• Buscarini et al. v. San Marino, ECHR Reports 1999-I (February 18, 1999); *Buscarini case*

> Newly elected members of the legislative body in San Marino had to take an oath "on the Holy Gospels". Some members refused under Article 9 of the Convention, claiming negative freedom of religion. The European Court ruled in their favour.

• Dahlab v. Switzerland, ECHR Reports 2001-V (February 15, 2001); *Dahlab case*

> A teacher insisted on wearing a Muslim scarf at a public school, also in class. School authorities and courts prohibited it. The European Court upheld the prohibition, quoting state religious neutrality.

• Karaduman v. Turkey, appl. 16278/90 (May 3, 1993), D.R. 74 p 93; *Karaduman case*

> The Commission upheld a decision to prohibit a Turkish student from appearing on an official university document wearing the Muslim scarf. State secularism was an important factor.

[33] For an elaboration in this respect see Fahlbeck: op.cit. note 3 above.

• Kokkinakis v. Greece, 260-A ECHR (May 25, 1993); *Kokkinakis case*

The case dealt with proselytism. Of importance here is only the statement by the European Court, quoted in note 5.

• X v. UK, appl. 8160/78 (March 12, 1981), D.R. 22 p 27, *Muslim teacher case*

A male Muslim teacher asked for time off to attend Friday prayer at the mosque. For reasons related to the proper functioning of the school, the school authority saw itself obliged to refuse the request. The Commission accepted that but only after having established that the school authority had tried seriously to accommodate the employee but had found that it would meet with "serious problems" if it granted the request.

German cases:

• Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfG 93, 1 BvR 1087/91 (May 16, 1995), *Bavarian schoolroom cross case*

All schoolrooms in public schools in Bavaria were to display a cross (or crucifix). The Federal Constitutional Court found the regulation in violation of state neutrality in religious matters.

• Federal Constitutional Court (*Bundesverfassungsgericht*), BVerfG, 2 BvR 1437/02 (September 24, 2003), *Ludin case*

A teacher insisted on wearing a Muslim scarf at a public school, also in class. School authorities and the administrative courts prohibited it. The Federal Constitutional ruled the Constitution does not per se prohibit the scarf. However, a prohibition can be constitutionally acceptable if supported by clear state law.

• Federal Labour Court (*Bundesarbeitsgericht*), 2 AZR 472/01 (October 10, 2002); *Muslim salesclerk case*

A long-time privately employed salesclerk declared that she intended to start wearing a Muslim scarf. She was terminated. The Labour Court ruled in favour of the woman, stating that her freedom of religion outweighed the employer's freedom of to do business, in particular since problems were so far only anticipated.

REINHOLD FAHLBECK

ORA ET LABORA. GONDOLATOK AZ EGYETÉRTÉSBEN HOZOTT MEGOLDÁSÉRT

(Összefoglalás)

A vallási sokszínűség mára a legtöbb európai államban mindennapossá vált. Egyre megszokottabbak és egyre több figyelmet vonnak magukra a különböző vallási megnyilvánulások és jelképek az iskolákban és a munkahelyeken. A tanulmány ezt az új helyzetet vitatja meg röviden. Két kérdést tárgyal. *1.* Milyen reakciókat váltott ki ez a folyamat a jog területén. *2.* Milyen további reakciók várhatók. A tanulmány középpontjában az 1950-es európai emberi jogi egyezmény és az Európai Bíróság ítélkezési gyakorlata áll. A kérdések ellentétpárokon keresztül kerülnek bemutatásra. Tágabb vagy szűkebb játékteret biztosít-e a vallási sokszínűség a vallási megnyilvánulások számára? A kultúra vagy a vallás körébe tartoznak-e az egyes megnyilvánulások és jelképek? Veszélyeztetik-e egyes vallási szokások a nők és férfiak egyenjogúságát? Mi a bevándorlási politika célja, az egyformaság biztosítása, vagy a sokféleség létrehozása? Uralkodik-e a vallási többség a vallási kisebbségek felett? Eltérő válasz adandó-e ezekre a kérdésekre állami és nem állami intézmények esetében? Végezetül a fenti kérdések megválaszolásának módszertanához ad néhány támpontot a tanulmány.